No. 83-2140

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

MURRAY CITY, SCOTT ROBINSON, GARY REID and JOHN DOES 1 through 20, Petitioners.

vs.

CRAIG K. MISMASH.

PETITIONER'S REPLY BRIEF

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Petitioners submit the following Reply to respondent's Brief in Opposition to the Petition for Writ of Certiorari.

ARGUMENT

POINT I

BURNETT v. GRATTAN DOES NOT REQUIRE DENIAL OF THE PETITION

The same day the Petition for Writ of Certiorari in this case was served, this

Court decided Burnett v. Grattan (No. 83-264, June 27, 1984, 52 U.S.L.W. 4916).

In Burnett, Maryland law provided a six-month statute of limitations for the filing of employment discrimination complaints with the Maryland Human Affairs Commission; it was conceded if that statute did not apply, then the Maryland three-year "catch-all" statute did.

The Court concluded that the six-month statute was not applicable because of (1) the practical differences between the administrative proceedings governed by the Maryland statute, and a civil action in federal court, and (2) the divergence in the objectives of the state administrative procedure and a federal

cause of action to vindicate constitutional rights.[1]

Under the circumstances, the Court's reluctance to apply the six-month statute in Burnett was understandable; however, those circumstances are simply non-existent in the instant case.

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1 The Court noted that the causes of action created by the Civil Rights Acts exist independently of any other relief that may be available, are judicially enforceable in the first instance, are broad, do not limit who may sue, do not limit the cause of action to a circumscribed set of facts, and do not preclude money damages. In contrast, under the Maryland administrative scheme, the claimant's sole obligation is to simply file with the Commission a written Complaint, which need not be investigated. The Commission's goals are not compensation of persons whose civil rights have been violated, but rather only the prompt identification and resolution of disputes through conciliation and private settlement. The Maryland statutory scheme creates no private right of action, nor were money damages available.

First, the objective of the Utah statute of limitations is not different from, or discriminatory towards, a federal cause of action. Secondly, the Utah statute applies equally to all litigants in lawsuits involving false arrest, assault and battery. Third, there are no differences, practical or otherwise, between the legal proceedings contemplated by the Utah statute and an action in federal court; both would require retention of counsel or appearance pro se, investigation, the filing of a Complaint, and the willingness to engage in the normal incidents of civil litigation, whether in state or federal court.

The concurring opinion in Burnett, however, re-emphasized some basic principles for which Petitioners contend: (1) There is nothing inherent in a civil rights claim that makes it invariably more difficult to investigate or plead

than a state law claim, (2) The federal courts are not required to prefer a longer statute of limitations over a shorter, (3) Statutes of limitations have long been respected as fundamental and generally cannot be said to be disfavored.

The concurring opinion further observed that if a state statute of limitations discriminates against federal claims, or fails to afford a reasonable time, then state legislative intent could be disregarded, and noted:

> . . . the correct inquiry is to examine the intent of the state legislature in enacting a statute of limitations. If that inquiry indicates that the legislature would have intended that statute to apply to the particular claim before the court, then the court must apply that limitations period, unless the statute discriminates against the federal claim or does not afford a reasonable amount of time in which to bring the claim. 52 L.W. at 4922.

In the instant case, the apparent intent of the Utah Legislature is simply that claims for assault, battery and false arrest be brought within one year, regardless of the status of the parties or whether the venue is state or Federal. Under the reasoning of Burnett, the Utah one-year statute is not inappropriate for application to a civil rights action based upon assault, battery and false arrest, and that decision does not require denial of the Petition.

POINT II

RECENT DECISIONS OF THIS COURT, AND THE DISADVANTAGES INHERENT IN THE APPLICATION OF STATE STATUTES OF LIMITATIONS, SUGGEST A REEVALUATION OF THE "O'SULLIVAN" RULE

Since O'Sullivan v. Felix, 233 U.S. 318 (1914), the assumption has been that an "appropriate" state statute of limitations must be applied to actions brought pursuant to the Civil Rights Acts (42

U.S.C. §§ 1981, et seq.). While the rule seems simple in theory, it has in practice proven difficult to apply and inconsistent in result.[2] The federal courts of necessity have thus devoted an inordinate effort to the issue of which statute of limitations of a particular state, at a particular time, applies to a given civil rights claim.

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2 Some courts analogize a civil rights claim to the underlying tort, some as a contractual claim, some as injuries to a person or to personal rights, and some apply "catch-all" statutes. Different statutes may be applied to actions under §§ 1981 or 1982, versus §§ 1983 or 1985. Further problems arise when a state statute purports to specifically govern a federal civil rights action. See Statutes of Limitations in Federal Civil Rights Litigation, Ariz. St. L.J. 1976:97. Indeed, the Utah federal court has dismissed claims against the assaulting officer based upon the one-year statute, but applied a four-year negligence statute to the supervisor charged with negligent failure to train; a result, at best, anomalous. Billings v. Vernal City, No. C-77-0295 (D. Utah).

The difficulties inherent in the application of various state statutes of limitations could be resolved by the uniform application to all civil rights actions of one statute: the limitations period provided by 42 U.S.C. § 1986. The essence of the theory by which this result could be achieved is, briefly stated, as follows:

A one-year statute of limitations is established by § 1986 for neglect to prevent a conspiracy under § 1985. Section 1985, while containing some elements different from, for example, § 1983[3] nevertheless, at bottom, directly protects the same fundamental rights protected in §§ 1981, 1982, and 1983.

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3 Section 1985 does not require state action, but does require conspiracy and a discriminatory animus, Griffin v. Breckenridge, 403 U.S. 88 (1971).

Section 1985 makes actionable, inter alia, conspiracies:

1. To deny equal protection, privileges and immunities, or

2. To injure another in his person or property, or

3. To deprive another of having or exercising any right or privilege of a citizen.

The broad language of § 1985 thus encompasses those rights involved in, for example, a § 1983 claim, and no reason readily appears why the one-year statute in § 1986 should not govern actions under the related, companion statutes, as the same fundamental constitutional rights are protected.

The interrelationship between, and the terminology of, the Rules of Decision Act, 28 U.S.C. § 1652, 42 U.S.C. § 1988 and § 1986, and the companion statutes, 42 U.S.C. §§ 1981, et seq., have not, to date, been closely analyzed in the instant context, and such analysis

discloses that the one-year statute of § 1986 may, indeed, be applicable to the related civil rights statutes.

First, the Rules of Decision Act does not, by its terms, directly require the application of a state statute of limitations to a civil rights action. The Act provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C 1652 (emphasis added).

It has yet to be decided whether the one-year statute of limitations of § 1986, or the directions of § 1988, are such an "act of Congress otherwise providing," within the meaning of the Rules of Decision Act.

Secondly, O'Sullivan ignored § 1988, which provides in part:

> The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect . . . . (emphasis added)

Again, neither O'Sullivan nor any subsequent decision of this Court has appeared to consider whether § 1986 is such a "law of the United States," to which the related civil rights statutes are subject by virtue of § 1988. Section 1988 deals directly and specifically with the Civil Rights Acts, and would seem to have as much, if not more, relevance as the older and more general Rules of Decision Act.

Thus, a "law of the United States," such as the limitations period found in § 1986, the application of which is preferred over state statutes by both the Rules of Decision Act and § 1988, could

reasonably be found applicable to the associated Civil Rights Acts.

Burnett, as in other decisions since O'Sullivan, assumes with little discussion that a state statute must be applied. Burnett, while recognizing the three-step process required by § 1988 (52 L.W. at 4918), nevertheless did not consider whether the first step of § 1988 authorized the application of a suitable "law of the United States."[4]

While Burnett recites that federal courts will turn to state law for

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4 It did not because the issue was not presented. Further, it was agreed by the parties that if the six-month state statute did not apply, then the three-year state statute did (52 L.W. 4917, Note 7); nor was the issue presented as to whether the inquiry would vary depending upon the particular civil rights statute involved (52 L.W. 4918, Note 11); nor did the Court reach the question of the application of the one-year statute of limitations in § 1986 to the plaintiff's claims (52 L.W. 4918, Note 12).

statutes of limitations, none of the cases (after O'Sullivan) relied upon for that proposition[5] directly deal with the rationale as to why such a result is required.

Furthermore, close analysis of O'Sullivan discloses that it is doubtful whether it is in fact valid authority for the proposition for which it is so often cited. First, the sole question in O'Sullivan was merely whether the complaint was for damages or for a penalty; if for a penalty, the five-year federal statute applied, and if for damages, the one-year state statute applied.

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5 Johnson v. Railway Express, 421 U.S. 454 (1975), apparently the first case since O'Sullivan to deal with the issue, simply cites O'Sullivan without discussion. All subsequent cases, for example, Board of Regents v. Tomanio, 446 U.S. 478 (1980), and Chardon v. Soto, 103 S. Ct. 2611 (1983), simply cite their predecessors, all of which rely ultimately on O'Sullivan.

O'Sullivan did not hold that state law must be applied in such a case, but only that the application of state law is not precluded merely because the action arises under the laws of the United States.[6] 233 U.S. at 322. Next, O'Sullivan undertook no analysis of the interrelationship between the Rules of Decision Act (enacted in 1789 as part of the Judiciary Act), and the later companion statutes to §§ 1983 and 1985, to

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6 The authority cited by O'Sullivan was McClaine v. Rankin, 197 U.S. 154 (1905), which held that the Rules of Decision Act required application of a Washington statute of limitations in an action involving personal liability of bank shareholders. McClaine, in turn, relied upon Campbell v. Haverhill, 155 U.S. 610 (1895), which applied a state statute of limitations in an action for patent infringement, where the federal limitations statute had been repealed, or not reenacted; any other result would have allowed such a claim to exist in perpetuity contrary to the Court's clear aversion to such a result. Id. at 616.

wit, §§ 1988 and 1986; indeed, § 1988 was not even mentioned. Most importantly, the basis for the "O'Sullivan Rule," (that the Rules of Decision Act requires application of a state statute of limitations to a federal question case) in fact no longer exists. DelCostello v. International Brotherhood of Teamsters, 103 S. Ct. 2281 (1983) recognized that, since Erie v. Tompkins, 304 U.S. 64 (1938), the Rules of Decision Act does not require the mandatory application of state statutes of limitations in non-diversity cases. 103 S. Ct. at 2287-88, Note 13. It thus remains an open question whether § 1988 authorizes the application of the statute of limitations found in § 1986 to the related civil rights actions, §§ 1981, et seq.

The reasoning of DelCostello provides a further rationale for the application of a related federal statute of

limitations such as § 1986. In Del-Costello, the Court declined to apply a state statute of limitations in an action by employees against employers and unions. As in the instant case, there was no federal statute of limitations specifically applicable. While acknowledging that resort to state law may remain appropriate, nevertheless, the court observed that such state statutes may be unsatisfactory vehicles for the enforcement of federal law. The Court may now decline to borrow state law, and instead use timeliness rules drawn from federal law, including "express limitations periods from related federal statutes." 103 S. Ct. at 2289.

> [T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of

> the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.' Id.

Concluding that the national interest in the enforcement of the claims involved in DelCostello was not served by applying a variety of state statutes, the Court held that it would apply a federal statute of limitations governing a related, but not identical, statutory claim.

The reasoning of DelCostello seems equally applicable to civil rights cases. If there is a national interest in the enforcement of actions such as found in DelCostello, there must also be a national interest in the enforcement of civil rights actions. As in DelCostello, there is not always an obvious state law choice for application to a civil rights action. The one-year statute found in

§ 1986, however, governing actions "related" to those found in § 1981, et seq., would seem to clearly provide a closer analogy than the various state statutes which were likely not enacted with any consideration of the national interests thereby affected. As this Court has observed on many occasions, the Civil Rights Acts are remedial in nature and enforce important national interests in the protection and vindication of constitutional rights. It is doubtful whether those interests are now well served by the O'Sullivan Rule, which enmeshes the courts in a continuing quarrel over which of a melange of essentially irrelevant state statutes should be applied to civil rights actions, with inevitable inconsistency and uncertainty.

This Court should now reconsider the proposition that state statutes of

limitations must always be applied to civil rights actions.[7]

CONCLUSION

The rationale of Burnett does not require denial of the Petition. The Utah one-year statute, unlike that at issue in Burnett, is applied even-handedly, to all plaintiffs and all defendants, reflects a rational judgment in pursuit of the goals of settled expectations and factfinding accuracy, is not discriminatory towards federal claims, and provides a reasonable length of time for a plaintiff to reflect upon his situation and prepare a Complaint.

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7 Such might be considered "judicial legislation," but as Justice White noted in International Union v. Hoosier Cardinal Corp., 383 U.S. 696, 713 (1960), "But here there is no dispute concerning whether a statute of limitations is to be fashioned - the choice is between one statute or fifty."

Alternatively, the Court should grant the Petition to consider whether the "O'Sullivan" rule should be modified as proven in practice to be incompatible with the national interest in uniform enforcement of civil rights and whether the application of a federal statute of limitations better serves those interests.

For the reasons above set forth, and as contained in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted this ____ day of _____, 1984.

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